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Separate proceedings in energy regulatory cases. A summary of the doctoral dissertation in Polish

The subject of the research covered in the dissertation is separate proceedings in energy regulatory cases.

Separate proceedings in energy regulatory cases should be understood as civil court proceedings brought as an appeal against a decision of the President of the Energy Regulatory Office (hereinafter: the President of the ERO, the Regulator) and civil court proceedings brought as a complaint against a decision of the President of the ERO, regulated by the provisions of the Code of Civil Procedure (hereinafter: the CCP), i.e. Articles 479⁴⁶ to 479⁵⁶ of the CCP and, to the extent not regulated by those provisions, by the general rules of proceedings.

The subject of proceedings in energy regulatory cases is a dispute between an energy entrepreneur and an energy sector regulator, the President of the ERO, regarding a resolution issued by the President of the ERO, i.e. an administrative decision or a ruling [*Polish: postanowienie*]. The proceedings are initiated by an energy entrepreneur dissatisfied with the resolution issued by the President of the ERO and are held before a common court (in the first instance, before the Court of Competition and Consumer Protection [*Polish: Sąd Ochrony Konkurencji i Konsumentów*], which is one of the divisions of the Regional Court in Warsaw, hereinafter: the CCCP).

Given the foregoing, there is a key distinguishing feature of proceedings in energy regulatory cases: the court proceedings pending before the CCCP, which are civil proceedings, are preceded by administrative proceedings before a central public authority (the President of the ERO). Significantly, in such cases, the issuance of an administrative decision (ruling) by the President of the ERO conditions the admissibility of a court trial before the CCCP, within the meaning of Article 2 of the CCP. The proceedings before the President of the ERO and proceedings before the CCCP differ fundamentally. The former are administrative proceedings, conducted under the regime and following a procedure laid down in the Code of Administrative Procedure (hereinafter: the CAP). In it, the Regulator acts as the public authority before which the administrative proceedings are held, while the energy

entrepreneur appears as a party thereto, being ultimately the addressee of the decision or a ruling issued by the Regulator. In administrative proceedings, the President of the ERO is vested, with respect to the energy entrepreneur, with powers of authority. At the same time, administrative proceedings are based, among other things, on the principle of objective truth, which requires that the authority undertake *ex officio* all actions necessary to accurately clarify the facts. On the other hand, the proceedings before the CCCP are civil court proceedings held under the regime and following the procedure laid down in the CCP. In those proceedings, the energy entrepreneur and the President of the ERO are equal litigants (plaintiff and defendant, respectively). At the same time, the CCP regulation is based, among other things, on the principle of adversarialism, according to which the court resolves the case based on evidence examined at the request of the litigants, without taking its own initiative in gathering evidence.

The above-mentioned distinctive feature testifies to the adoption by the Polish legislature of a special, mixed (administrative-civil) model for the examination of energy regulatory cases. Such a model should be considered 'special' since common courts examine energy regulatory cases as an exception to the constitutional principle that the activities of public authorities are controlled by administrative courts. Consequently, the cases commented on, being administrative cases by their nature, constitute a civil case in the formal sense (within the meaning of Article 1 *in fine* of the CCP), subject – as an exception – to examination and resolution by common courts and the Supreme Court (hereinafter: SC) in civil proceedings using the regulations of the CCP.

The intentions behind the adoption of the mixed model have not been clearly, let alone in detail, presented in the legislative materials. The lack of substantive justification for the adopted solutions does not positively affect the litigants' position in those cases (the plaintiffs, the President of the ERO and the courts), who face difficulties in applying selected provisions of the regulation. Despite the fact that over the course of (soon to be) twenty years of their application, the regulations have not changed significantly, not all doubts that have been raised based on the same can be considered clarified.

Despite initial doubts, the judicature and the doctrine take the position that the filing of an appeal by an energy entrepreneur with the CCCP against a decision of the President of the ERO corresponds to the filing of an action before the court (in other words, that the appeal

acts as a lawsuit, i.e. the first pleading initiating court proceedings in a given case), and that the court proceedings initiated by the filing of such an appeal constitute first-instance adversarial proceedings. It is assumed that the task of the CCCP is not only to control the legality of the challenged decision of the Regulator, but also its legitimacy and expediency, which diverges significantly from the classic judicial-administrative model of control over the activities of public authorities.

The determination of the first-instance nature of energy regulatory cases was undoubtedly a milestone in the perception of the foundations of its functioning. However, it refreshed the need to determine whether, and if so to what extent, the fact that they are preceded by administrative proceedings before the President of the ERO, who is a defendant in the proceedings before the CCCP, should be taken into account in the proceedings before the CCCP (as first-instance proceedings). In the case of a number of procedural institutions, these implications have proved (and, as practice indicates, still prove) unobvious. This stems from various reasons.

First of all, the basic regulation regarding proceedings in energy regulatory cases (i.e. Articles 479⁴⁶ to 479⁵⁶ of the CCP), the purpose of which – as a regulation of separate proceedings – is to identify and precisely regulate the distinctiveness of the proceedings versus the basic proceedings model, does not include within its scope a number of distinctive features not easily (obviously) deducible from the peculiarities of proceedings in energy regulatory cases at the stage of appropriate application of the general rules of proceedings. As an example, one can point to the peculiarities relating to the distribution of the burden of proof, the admissibility of the formulation of allegations of violation of the provisions of the CCP by the President of the ERO, or the CCCP's obligation (admissibility) to take into account, when resolving a case, the circumstances that occurred after the decision of the President of the ERO and the resulting appeal to the CCCP. Secondly, some of the provisions of the CCP, which constitute the basic regulation of the proceedings in energy regulatory cases, have not been sufficiently clearly or precisely regulated (by way of example, one can point to the provision governing the self-regulatory powers of the President of the ERO – Article 479⁴⁸ section 2 of the CCP). Other provisions seem to contain an error (by way of example, one can point to Article 479⁵⁰ section 2 of the CCP, which implies that the interested party is the third party to the proceedings, whereas it is an unquestioned rule of proceedings that there are two parties

to a lawsuit). Finally, in the case of selected procedural institutions, the occurrence of separateness or its nature or the lack thereof may depend on the subject matter of the dispute (by way of example, one can point to the specificity of appeals against the decisions of the President of the ERO imposing a fine or those concerning the approval of a tariff amendment).

The above-mentioned circumstances cause or exacerbate difficulties in interpreting and applying selected provisions of the CCP governing energy regulation proceedings. At the same time, they testify to the fact that the legislator – consciously or not – has left significant room for interpretation. In practice, this results in the necessity for the judicature to resolve interpretative doubts arising on the grounds of that regulation. Meanwhile, the conclusions drawn from the available rulings may raise doubts as to whether, when faced with the necessity of interpreting ambiguous provisions governing proceedings in energy regulatory cases, the courts each time interpret them in a way that allows the regulation to be considered rational, systemically consistent and logical, taking into account the specifics of proceedings in energy regulatory cases and the need to ensure the effectiveness of the legal remedy available to the addressee of decision of the President of the ERO. At the same time, it should not be overlooked that whenever a legal provision raises doubts, the uncertainty of the court's final position on its interpretation and the risks associated therewith are borne by the parties to the proceedings. It can be doubted whether they are evenly distributed in the proceedings under examination, especially since the President of the ERO, as a defendant in any one case of this nature, has access to all rulings issued in energy regulatory cases, while the plaintiff has access only to case law available on a general basis.

The realities of resolving energy disputes outlined above, including the magnitude of the interpretive difficulties encountered under selected provisions of the CCP, raise questions about the rationality of the legislator's actions with regard to the adopted regulation. In particular, one wonders whether the legislator has sufficiently considered and adequately taken into account, within the framework of this regulation, the implications of the fact that the proceedings before the CCP are preceded by administrative proceedings. One also wonders whether – and if so, to what extent – the conclusions of the analysis of the CCP regulations in terms of the issues indicated above affect the assessment of the actual level of effectiveness of the legal remedies available to an energy entrepreneur against the decisions

of the President of the ERO before the CCCP, in particular when one takes into account that the ruling that will eventually be made before a court in energy regulation proceedings may be of significant importance for the existence or operation of the activities of this entrepreneur, and thus may affect the country's energy security. This issue has not yet been comprehensively studied or discussed; it encompasses an objective state of ignorance, which is the starting point for scientific research on the code regulation of proceedings in energy regulatory cases.

Given the above, the main task of the dissertation is to determine whether the regulation of the CCP applicable in the proceedings of appeal against the decision of the President of the ERO and in the proceedings of complaint against the decision of the President of the ERO (i.e. primarily the regulation of Articles 479⁴⁶ to 479⁵⁶ of the CCP) provides an energy entrepreneur with effective means of legal protection against an unlawful action or omission of the President of the ERO (reflected in the resolution or substantiation of the administrative decision or ruling issued by the President of the ERO), allowing the entrepreneur to obtain real (effective) protection of its rights through proceedings in energy regulatory cases, and, in particular, whether the procedure adopted within the framework of this regulation for the adjudication of energy disputes, including the rules of conduct of the parties and the court adopted therein, as well as the adjudication of the subject matter of these disputes, guarantees the parties equal (corresponding) procedural rights, as well as obtaining a fair resolution issued by the court in conditions in which the adjudicating court understands and takes into account the specifics of the disputed issue and the functioning of the sector it concerns. It should be emphasized that the indicated research problem is important not only from a theoretical, but also from a practical point of view.

In view of the research problem thus outlined, the thesis of the dissertation is as follows: Although the regulation of the CCP guarantees the energy entrepreneur the right to refer to civil proceedings an appeal against any decision of the President of the ERO issued in their case and a complaint against a significant part of the decisions of the President of the ERO issued in their case, the analysis of the procedure adopted under the regulation for the examination and resolution by common courts and the Supreme Court of cases initiated by filing them does not allow to confirm that an appeal against a decision of the President of the ERO and a complaint against a decision of the President of the ERO allow the energy entrepreneur to

obtain real (effective) protection of their rights in the case of any (type of) energy dispute. The introduction of certain legislative changes and systematization of practice in the application of selected provisions of the CCP applicable in energy regulatory cases should lead to the removal of a significant part of the interpretative doubts, promoting the strengthening of the real effectiveness of the means of protection in the form of an appeal (complaint) available to the entrepreneur against the decision (ruling) of the President of the ERO. The purpose of the dissertation is to analyze the relevant aspects of the research problem to the extent that would allow either to confirm or contradict the thesis formulated above.

For the purpose of conducting research and analysis, essentially three research methods were used: formal-dogmatic, legal-comparative and historical-comparative. The main focus was on domestic regulation and jurisprudence, and given the limited access to domestic jurisprudence issued in energy regulatory cases and the vestigial literature on the subject, the lessons learned from the experience accumulated in energy regulatory cases and the relevant rulings issued, as well as the possibility of relying on case law and doctrine on similar regulatory proceedings, were of particular importance.

The dissertation comprises five chapters preceded by an introduction and a list of abbreviations used, and concludes with a summary of key findings.

The introduction brings forth the issue under consideration in the dissertation, presents the research problem and establishes the dissertation thesis. The reason for the choice of the subject is explained and the scope of consideration is outlined. The research methodology adopted and the assumptions and objections underlying the dissertation are also indicated. The introduction concludes with a presentation of the systematics of the work.

The title of Chapter I of the dissertation is “The Right to Appeal against the Decision of the President of the ERO”. The chapter is introductory in nature. It begins by indicating the fundamental (domestic and European) sources of the right to appeal against the decisions of the President of the ERO. The purpose of this chapter is to establish the essence and function of the right to appeal against the decision of the President of the ERO, taking into account the fact that the right is rooted in sectoral EU directives, as well as a broader view of this right (in particular, through the prism of the right of access to court, including the right to an effective remedy).

In Chapter II of the dissertation, entitled “The Polish Model of Proceedings in Energy Regulatory Cases”, the author discusses the issues that form the starting point for a discussion concerning the details of the CCP-based regulation of energy regulatory proceedings. That chapter begins with an indication of the provisions governing the proceedings in energy regulatory cases and a discussion of their place in the structure of civil procedure. Since the determination of the meaning of the concept of an *energy regulatory case* is important not only for the purpose of defining the limits of the cognition of the CCCP, but also to outline the subject matter of the judicial proceedings in those cases (since the subject matter of the appealed decision of the President of the ERO determines the subject matter of the judicial proceedings initiated with regard to a given decision), as well as their specificity and diversity, the concept of an *energy regulatory case* was analyzed (according to the formal and then substantive criterion). For this purpose, in particular, the characteristics of the energy sector, the scope of powers and duties of the President of the ERO and the subject of administrative decisions and orders issued by the President of the ERO, as correlated with those powers, have been presented. Chapter II also outlines the model adopted in Poland for the adjudication of energy regulatory cases, as an example of an exception to the constitutional principle that it is the administrative courts that control the activities of public authorities, and explains its specifics. As a natural consequence of the above, Chapter II discusses the issue of admissibility of legal proceedings in energy regulatory cases. Finally, the chapter provides an outline of CCP regulations governing proceedings in energy regulatory cases, taking into account significant amendments.

Chapter III is entitled “Proceedings on Appeal against the Decision of the President of the ERO” and is crucial to the dissertation, as its subject is a detailed analysis of the provisions of the CCP governing the proceedings before common courts and the Supreme Court in cases concerning appeals against the decisions of the Regulator. The chapter not only approximates the subject matter of Articles 479⁴⁶ to 479⁵⁶ of the CCP, but also that laid down in selected other provisions of the CCP (general provisions on trial) that are appropriately applicable to the appeal proceedings against decisions of the President of the ERO, but nevertheless may raise doubts or difficulties in their application in those proceedings. Chapter III primarily discusses the following issues:

- the jurisdiction of the court, including the legal nature of the CCCP and the appeal proceedings before it against decisions of the President of the ERO;
- parties to the appeal proceedings, including the issue of the interested party, the arrangement of procedural roles and legal representation;
- filing an appeal against decisions of the President of the ERO, including the formal and fiscal requirements for an appeal, the time limit and the procedure for filing it;
- self-regulation powers of the President of the ERO after filing an appeal, including the subject matter and resolution of a new decision of the Regulator issued as a result of self-regulatory actions, the time limit for the Regulator to transfer the appeal to the CCCP, as well as the contestability of the Regulator's tardiness in this regard;
- a motion to suspend the execution of a contested decision, including the prerequisites for the suspension of execution, the permissible scope of suspension of execution, the contestability of refusal to suspend the execution, and the permissibility of filing a motion for the suspension of execution directly with the CCCP;
- the subject matter of the appeal proceedings and the scope of the CCCP's examination of the case, including the admissibility of bringing forth in the appeal the allegations concerning the violation of the provisions of the CAP;
- court composition;
- response to the lawsuit;
- the scope of evidence proceedings, including the burden of proof, the specifics of the appeal proceedings against the decision of the President of the ERO imposing a fine, the status of evidence collected at the stage of administrative proceedings, be it classified or confidential;
- the admissibility of a settlement;
- the rulings of the CCCP, including the binding of the CCCP on the appellant's application, and the appealability of the CCCP's rulings.

Chapter IV of the dissertation, entitled "Complaint Proceedings against the Rulings of the President of the ERO", analyzes the second type of proceedings in energy regulatory cases, i.e. complaint proceedings against rulings of the President of the ERO. Due to the scarcity of regulations on this subject, and because, in accordance with the CCP, the provisions regulating

the appeal proceedings against the rulings of the President of the ERO (discussed in Chapter III of the dissertation) apply accordingly to the complaint proceedings against decisions of the President of the ERO, attention in Chapter IV is focused on selected aspects specific to the complaint proceedings. Consequently, the following has been analyzed:

- which decisions of the President of the ERO are subject to appeal by way of complaint to the CCCP;
- the nature of complaint proceedings against a ruling of the President of the ERO;
- the type of decision by which the CCCP resolves on the merits of the complaint against the ruling of the President of the ERO: whether it is a judgment or an order;
- whether, in the case of any complaint against the decision of the President of the ERO, a party is entitled to appeal against the merit-based resolution of the CCCP.

Chapter V of the dissertation is entitled “Evaluation of the Regulations Governing Energy Regulatory Proceedings”. The chapter evaluates the conclusions drawn from the analysis of the CCP regulations concerning energy regulatory proceedings. The evaluation was carried out from the point of view of the essence of the right to appeal, in particular, from the point of view of the effectiveness of the legal protection provided to the energy entrepreneur by filing an appeal against decisions of the President of the ERO or a complaint against decision of the same to the CCCP. This, in turn, made it possible to verify the doctoral thesis. Chapter V also summarizes the *lex ferenda* postulates resulting from the considerations of the dissertation.

The dissertation takes into account the legal status as of 31 December 2022.